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No. 02-908

In the Supreme Court

OF THE

United States

OCTOBER TERM, 2002

AGOP BERGHOUDIAN,
Petitioner,

VS.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari To The United States Court of Appeals For the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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38 pp

QUESTIONS PRESENTED

1. Whether the decision in *United States v. Ruiz*, ___ U.S. ___, 122 S.Ct. 2450 (2002) constitutionally can be applied retroactively to pleas entered before that decision, at a time when defendants relied on Circuit Court authority which required disclosure of *Brady/Giglio* material about an informant before entry of a plea of guilty?

2. Whether the failure of the government, before Petitioner entered a plea of guilty, to disclose substantial, material information essential to the presentation of an entrapment defense, despite binding authority in the Ninth Circuit requiring such disclosure, denied Petitioner due process of law, and made his plea involuntary?

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Opinion Below

United States of America v. Berghoudian, Unpublished Memorandum, (9th Cir. No. 00-50489), dec. August 9, 2002.

PETITION FOR A WRIT OF CERTIORARI

This is a Petition for Writ of Certiorari brought to review the unpublished Memorandum of the United States Court of Appeals for the Ninth Circuit filed August 9, 2002 [Appendix A] which affirmed Petitioner's conviction and sentence for conspiracy to distribute methamphetamine, and the district court's denial of Petitioner's motion to withdraw his guilty plea. The Petition raises substantial and critical issues concerning the retroactive application of *United States v. Ruiz*, ___ *U.S.* ___, 122 S.Ct. 2450 (2002) to defendants who entered pleas of guilty within various Circuit Courts which, before *Ruiz*, required disclosure of *Brady/Giglio*[1] material before entry of a plea of guilty.

SUMMARY OF JURISDICTION

The unpublished Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit was filed August 9, 2002. A timely Petition for Rehearing was denied by order of the court September 20, 2002 [Appendix B].

Jurisdiction is appropriate under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States states:

> "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces or in the Militia, when in actual service in time of War or public danger; nor shall any

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[1] *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972).

person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

SUMMARY OF ARGUMENT

This Petition raises substantial and critical issues regarding the propriety of retroactive application of *United States v. Ruiz*, ___ U.S. ___, 122 S.Ct. 2450 (2002) (which held that discovery of impeaching material *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972) need not be disclosed before the entry of a plea of guilty) to pleas entered before *Ruiz*, at a time when a Circuit Court rule *required* disclosure of such information to a defendant who was proposing to plead guilty.[2] Defendants such as Petitioner had the right to rely on the good faith of the United States to comply with its obligation to disclose exculpatory material. Petitioner properly concluded that a failure to disclose *Brady/Giglio* material was an affirmative statement by the government that no such impeaching evidence existed.

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[2]Such a rule existed in the Ninth Circuit. *Sanchez v. United States*, 50 F.3d 1448 (9th Cir. 1995); *United States v. Basalo*, 258 F.3d 945, 949 (9th Cir. 2001). Similar rules had been propounded by other Circuit Courts. *United States v. Avellino*, 136 F.3d 249, 255 (2nd Cir. 1998); *In re U.S.*, 267 F.3d 132 (2nd Cir. 2001); *Campbell v. Marshall*, 769 F.2d 314 (6th Cir. 1985), *cert. denied, sub nom, Campbell v. Morris*, 475 U.S. 1048 (1986); *White v. United States*, 858 F.2d 416 (8th Cir, 1988), *cert. denied* 489 U.S. 1029 (1989); *United States v. Wright*, 43 F.3d 491 (10th Cir. 1994). *cf. Smith v. United States*, 876 F.2d 655 (8th Cir.) *cert. denied*, 493 U.S. 869 (1989). In other Circuits the issue was open. See for example *United States v. Brown*, 250 F.3d 811, 816 n.1 (3rd Cir. 2001); *Matthew v. Johnson*, 201 F.3d 353, 358 (5th Cir. 2000).

Following Petitioner's plea, as a result of discovery obtained in furtherance of a motion for sentencing entrapment, substantial, critical and devastating evidence was revealed concerning not only the informant, but the investigating agents in the case, which, had it been known earlier, would have led Petitioner to forego a guilty plea, and proceed to trial.[3]

The failure of the government to live up to its mandatory disclosure requirements under *Sanchez,* and the parallel reliance by Petitioner on non-disclosure as a representation that such material did not exist, not only denied Petitioner due process of law, but rendered his plea of guilty involuntary as a matter of law. Under these circumstances, the retroactive application of *Ruiz* violates due process of law.

STATEMENT OF THE CASE

Agop Berghoudian was indicted in the United States District Court for the Central District of California on November 25, 1997 and charged in seven counts with conspiracy and substantive methamphetamine transactions, and two weapons offenses.

Following receipt of discovery, Petitioner negotiated a plea of guilty pursuant to a written plea agreement. On July 6, 1998, Berghoudian pled guilty to Count 1 charging a violation of 21 U.S.C. § 846, conspiracy to distribute methamphetamine.

Over the course of the next several months, Petitioner pursued discovery with regard to a motion for downward

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[3]Attached as Appendix C is a summary of the information withheld from Petitioner which demonstrated the manipulative lying and violent nature of the informant, and the abject failure of the investigating agents to investigate or even question the informant's veracity when faced with mutually contradictory and clearly false statements by the informant concerning Petitioner.

departure for sentencing entrapment. As a result of that discovery, on March 23, 1999 Petitioner filed a motion to withdraw his plea, charging that the government had improperly withheld relevant material under *Brady v. Maryland,* 373 U.S. 83, 87 (1963) and *Giglio v. United States,* 405 U.S. 150 (1972). He contended that the withheld information was necessary to a proper determination of his decision to plead guilty, and that he was denied due process of law. At that time, in 1999, the Ninth Circuit *required* that *Brady/Giglio* material be provided to a defendant before he entered a plea of guilty. *Sanchez v. United States,* 50 F.3d 1448 (9th Cir. 1995).

After a hearing held July 10, 2000, the court denied the motion to withdraw the plea by an order dated July 19, 2000. Appendix D.[4]

Petitioner was sentenced on August 18, 2000 to a term of 151 months in custody, with various conditions of supervised release.

Petitioner filed a timely Notice of Appeal on August 18, 2000. Jurisdiction in the United States Court of Appeals for the Ninth Circuit was appropriate pursuant to 28 U.S.C. § 1291.

By Memorandum filed August 9, 2002, the court below affirmed the denial of the Petitioner's motion to withdraw his plea, concluding, in relevant part, that this Court's decision in *Ruiz* foreclosed any claim that a failure to disclose *Brady/Giglio* material was error.

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[4]That same order addressed a number of other motions to withdraw the Petitioner's plea, including a failure of the district court to question the Petitioner regarding drug use at the time of the plea, when Petitioner was on anti-psychotic medication as a result of a recent suicide attempt; and the wholesale failure of the district court to follow various provisions of Rule 11, Federal Rules of Criminal Procedure, in taking the plea.

In a timely Petition for Rehearing and Suggestion for Rehearing En Banc, Petitioner challenged the application of *Ruiz,* pointing out that, at the time of the plea in this case, the mandatory rule of *Sanchez* not only required the government to disclose *Brady/Giglio* material before a plea, but entitled the Petitioner to rely upon non-disclosure as an affirmative statement that such evidence did not exist.

The Petition for Rehearing was denied, without comment, on September 20, 2002.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

I.

THE FAILURE OF THE GOVERNMENT TO PRODUCE SUBSTANTIAL *BRADY/GIGLIO* MATERIAL REGARDING THE UNRELIABILITY AND VIOLENT BACKGROUND OF THE INFORMANT, AND WHICH DEMONSTRATED THE UNWILLINGNESS OR INABILITY OF THE CASE AGENTS TO CONTROL THE INFORMANT, DENIED PETITIONER DUE PROCESS OF LAW AND RENDERED HIS GUILTY PLEA INVOLUNTARY AS A MATTER OF LAW

This Court, in *Ruiz,* concluded that due process of law does not require disclosure of *Brady/Giglio* material before a defendant is made to decide whether to plead guilty or to proceed to trial. The decision below applied *Ruiz* to this case despite the fact that the plea of guilty in this case predated *Ruiz* by almost four years, and was entered at a time when the Ninth Circuit *required* the prosecution to disclose relevant *Brady/Giglio* material before a defendant entered a plea of guilty. At the time the plea was entered, Petitioner had the right to *rely* on a prosecutorial non-disclosure of *Brady/Giglio* as an affirmative representation that no such

evidence existed. In fact, substantial critical information which bore directly on Petitioner's ability to succeed at trial through an entrapment defense was possessed by the government, but withheld from Petitioner until after the entry of his plea of guilty.

The case against Petitioner consisted in substantial part of tape recorded conversations with an informant. Petitioner took the position that incriminating statements made on the tapes by him were the product of both threats and manipulation by the informant. He intended to raise the defense of entrapment at trial.

Discovery, before the entry of the plea of guilty, revealed minimal impeaching evidence regarding the informant. Petitioner was faced with the dilemma of proceeding to trial with virtually no corroboration of his version of the case — that he was entrapped — and a virtually certain conviction, or pleading guilty in an effort to reduce his potential exposure.

Petitioner was entitled to weigh in this calculus the non-disclosure of *Brady/Giglio* material by the government, and to interpret it as an affirmative statement that no further impeaching material existed. Operating under this false conclusion, he pled guilty, reserving the issue of sentencing entrapment.

This Court recognized the propriety of a defendant's reliance upon government non-disclosure of discovery in *United States v. Bagley,* 473 U.S. 667, 683 (1985):

> "In the present case, we think that there is a significant likelihood that the prosecutor's response to respondent's discovery motion misleadingly induced defense counsel to believe that [the witnesses] could not be impeached on the basis of bias or interest arising from inducements offered by the Government."

Here, not only was evidence of substantial inducements withheld from Petitioner, but significant and critical information concerning the reliability of the informant and his violent nature was also withheld. All of these matters went directly to Petitioner's ability to mount an entrapment defense.

After the entry of his plea of guilty, the government disclosed in substance, the following:

1. In a number of "30 day status reports" the Alcohol, Tobacco and Firearms [ATF] agent in charge of the case made the following statement about the informant:

> "During this reporting period, Special Agent Ciccone requested authorization to allow the above-mentioned CRI to be released from state custody temporarily to be utilize [sic] in this investigation. However, this request was denied, due to the fact that the CRI had a *long criminal history of violence and his/her reliability was questionable.*" (Emphasis added).

These reports, which were filed on a monthly basis in virtually identical language, were not revealed until after the plea of guilty.

2. *Monetary benefits.* Petitioner entered his plea on July 6, 1998. On August 27, 1998, the prosecution represented that the informant had received no considerations. On October 28, 1999, the government reiterated that the informant had received no benefits, indicating it had conducted an investigation into purported benefits.

On January 19, 1999, the government revealed for the first time that the informant had been paid in excess of $4,300 in expenses, and $1,250 in housing.

On March 4, 1999, it was revealed that in fact the informant had received $20,000.

3. *Early release.* On January 19, 1999, the government acknowledged the informant received an early release from custody at the behest of the government. On March 4, 1999, the government revealed that there had been numerous requests for his early release.

4. *Relocation.* On March 4, 1999, the government revealed that a number of family members had been relocated by the government, and that the informant had been offered placement in the Federal Witness Protection Program.

5. *The informant's stories about Petitioner.*

Although several reports concerning the informant's alleged contact with Petitioner were revealed before the plea, substantial contradictions in his story were not revealed until after the plea. A summary of these facts is included in Appendix C, and is too lengthy to repeat here. In summary, however, a review of all of the reports, and in particular the ones provided after the plea was entered, demonstrates mutually inconsistent stories regarding every aspect of the informant's alleged contact with Petitioner.

The inconsistencies further demonstrate the fact that, despite the informant having given the authorities multiple, mutually inconsistent, stories, the agents involved with the case *never* attempted to determine the accuracy of the stories, nor to confront the informant with these inconsistencies.

This evidence not only corroborated Petitioner's position that he was threatened and manipulated by the informant, but would have allowed him to attack the *bona fides* of the investigation, in a manner which would have brought the legitimacy of the entire prosecution into question.

This result is constitutionally intolerable in either a pre or post-*Ruiz* situation. The withheld information — known only to the government and completely inaccessible to a defendant — was critical and determinative of Petitioner's

ability to defend himself at trial. It would have been the deciding factor in determining whether Petitioner proceeded to trial.

But the result is particularly offensive in view of Circuit authority which, at the time of the entry of the plea, required disclosure of this information.[5]

Clearly, *Ruiz* does not answer the question posed here. The issue there was whether the Constitution required pre-plea disclosure of *Brady/Giglio* material. In *Ruiz,* the Petitioner never relied upon non-disclosure of impeaching information as an affirmative assertion in its non-existence.

Here, Petitioner pled guilty in reliance on the government's non-disclosure. Thus, whereas in *Ruiz,* the "im-

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[5]The Petitioner respectfully asks the Court to reconsider its decision in *Ruiz.* For, in many cases, such as this one, impeaching evidence which is necessary to ensure a "fair trial" must be disclosed to ensure a "fair sentencing". Delaying the disclosure of such information does little to further the interests of the government, and does much to harm the interests of a defendant. In such a case, also, the question of "witness safety", emphasized by this Court in *Ruiz,* is totally illusory. *Id.* at 2456.

This Court was also concerned with the burden imposed upon the prosecution to engage in "trial preparation" if it should be required to disclosed *Brady* material before a plea. Id. at 2457. It is respectfully submitted that it is the duty of the government to "devote resources" to finding out if its informant is a lying, conniving, violent and unreliable witness, and its case agent irresponsible and derelict, before it indicts an individual. In cases such as this, moreover, no further "work" was necessary. The violent, manipulative background of the informant was known and documented at the time of his plea. The incompetence of the investigator was equally well shown by his own reports. And, the government *knew* of the benefits to the informant, but nonetheless concealed them from Petitioner.

Finally, and perhaps most important, it is highly questionable whether a competent defense counsel, knowing that *Brady/Giglio* material need not be disclosed until shortly before trial, could conscientiously and ethically advise a defendant to enter a plea of guilty, in ignorance of the strength of his or the government's case.

peaching information" was only "special in relation to the *fairness of a trial,*" 122 S.Ct. at 2455 (emphasis in original) *here* the withheld information went directly to whether the plea was "voluntary".

Put another way, *Ruiz* claimed injury for a right which this Court found he did not possess. Petitioner here claims injury because his plea was induced by a government misrepresentation — the epitome of involuntariness.

This Court has consistently imposed a burden on the government to be bound by its representations to a defendant who is pleading guilty.

In *Santobello v. New York,* 404 U.S. 257 (1971) this Court recognized that a plea which is induced by unkept prosecutorial promises is involuntary:

> '[A] constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Id.* at 262.

See also *Blackledge v. Allison,* 431 U.S. 63 (1977); *Heckler v. Chaney,* 470 U.S. 821, 846 (1985).

The promise made here by the government, that it had properly fulfilled its discovery obligations under *Sanchez,* was not kept. The issue here is a simple one, but an extremely important one. A criminal defendant is entitled to rely on the government to meet all of its obligations, and when its failure to do so is an inducement for a plea, he is entitled to withdraw that plea.

In *Ruiz,* this Court makes the point that *Brady/Giglio* material is designed to ensure the fairness of a "trial". Here, Petitioner was not only deprived of a "fair trial" he was deprived of *any trial.* His decision to forego a trial, with its

attendant rights and opportunities, was induced by his justifiable reliance on government representations.

Had he been aware that, with evidence in the possession of the government, he would be able to show that the informant was "unreliable", "violent", and not subject to belief; that the informant told multiple, mutually inconsistent stories about his contacts with Petitioner; and that the government agents on the case had failed to recognize, or if they did recognize, failed to investigate or even question the informant about his misrepresentations, Petitioner would have proceeded to trial, and would have had an extremely strong entrapment defense.

He was deprived of the opportunity of any defense, because the government's explicit and implicit misrepresentations misled him in a way which resulted in a waiver of his right to trial.

CONCLUSION

Ruiz has changed the landscape of pre-plea criminal representation. Criminal defendants, and criminal defense counsel, are now required to make decisions on important issues such as whether to proceed to trial or enter a plea of guilty without access to facts upon which such decisions reasonably are based.

The situation becomes constitutionally intolerable in a pre-*Ruiz* guilty plea in a Circuit in which the government had been required to make affirmative disclosure of *Brady/Giglio* material before a plea of guilty.

Petitioner's plea of guilty can only be regarded as voluntary if one presumes that a criminal defendant must assume that the government has lied to him and withheld evidence in the face of a Circuit rule to produce it. It is difficult to imagine that this Court, or the Constitution, could support a rule which requires a defendant to distrust his government.

The issue is an important one, and one which will recur. The inapplicability of *Ruiz* to guilty pleas such as this must be made clear by this Court.

Dated: December 10, 2002

Respectfully submitted,

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APPENDIX

Appendix A	Memorandum of the United States Court of Appeals for the Ninth Circuit filed August 9, 2002
Appendix B	Order denying Petition for Rehearing dated September 20, 2002
Appendix C	Summary of Withheld Information
Appendix D	Order denying motion to withdraw plea dated July 19, 2000

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA

Plaintiff-Appellee,

v.

AGOP BERGHOUDIAN, aka Jack Agop Berghoudian,

Defendant-Appellant.

No. 00-50489

D.C. No. CR-97-01149-RSWL-01

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Ronald S.W. Lew, District Judge, Presiding

Argued and Submitted July 12, 2001
Submission deferred July 16, 2001
Resubmitted August 9, 2002
Pasadena, California

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U.S. COURT OF APPEALS

Before: FARRIS, SILVERMAN and PAEZ, Circuit Judges.

Defendant Agop Berghoudian appeals his conviction and sentence for conspiracy to distribute methamphetamine. Defendant first challenges the district court's denial of his

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

motions to withdraw his guilty plea. He contends that the government failed to disclose material information before he entered his plea, that he lacked competence to enter a knowing and intelligent plea, and that the district court violated Rule 11 of the Federal Rules of Criminal Procedure. Next, Defendant challenges the district's court refusal to depart downward from the sentencing guideline range for his substantial assistance to the government. Finally, Defendant contends that the district court improperly denied his motion for a downward departure for sentencing entrapment. We affirm. Because the parties are familiar with the facts, we will not detail them except as necessary.

A. Withdrawal of Defendant's Guilty Plea

1. *Brady* Violation

Defendant alleges that the prosecution withheld evidence that could be used to impeach the confidential informant, in violation of *Brady v. Maryland,* 373 U.S. 83, (1963). He argues that this evidence would have established an entrapment defense, and thus he was entitled to withdraw his guilty plea. Defendant's argument is foreclosed by *United States v. Ruiz,* 122 S. Ct. 2450, 2457 (2002), in which the Supreme Court recently held that the government is not required to disclose "material impeachment evidence" before entering a plea agreement with a defendant.

2. Competency to Plead Guilty

Defendant argues that because he was mentally incompetent at the time of his guilty plea, the district court should have allowed him to withdraw his plea. However, Dr. Klatte, the government's expert witness, opined that there was no evidence indicating that Defendant was so depressed that he could not competently consider his legal options. *See Miles v. Stainer,* 108 F.3d 1109, 1112 (9th Cir. 1977). In light of Dr. Klatte's testimony, the district court did not abuse its

discretion in rejecting this ground for vacating Defendant's guilty plea.

3. Rule 11

Defendant next contends that he should have been allowed to withdraw his guilty plea because the district court failed to inform him during the plea colloquy of his constitutional right to assistance of counsel at trial in violation of Rule 11(c) of the Federal Rules of Criminal Procedure. In determining whether Defendant was fully informed of his constitutional rights before entering his plea, we are not limited to the plea proceedings. *See United States v. Vonn,* 122 S. Ct, 1043, 1054-55 (2002). Here, there was no violation of Rule 11(c), because Defendant was advised of his right to counsel at trial during his initial appearance and arraignment before the magistrate judge. *Id.* at 1055.

Similarly, the district court's failure to inform Defendant that anything that he said under oath could later be used against him in a prosecution for perjury or false statement, see Fed. R. Crim. P. 11(c)(5), does not warrant vacating his guilty plea. "Rather, this failure bears upon the admissibility of defendant's answers . . . in a later prosecution for perjury or false statement." Fed. R. Crim. P. 11 advisory committee's notes (1982 amendments).

We also reject Defendant's argument that the district court's inquiry into the voluntariness of his plea pursuant to Rule 11(d) warrants reversal of his plea. Although the district court erred by not specifically asking Defendant whether his plea was the result of force or threats, the error was harmless because the court made multiple inquiries into whether the plea was made knowingly and voluntarily. *See United States v. Van Doren,* 182 F.3d 1077, 1080 (9th Cir. 1999). Furthermore, the court ensured that the language barrier did not interfere with Defendant's ability to understand the court proceedings and plea agreement. Finally,

Rule 11 does not require a district court to inquire whether a defendant is under the influence of drugs or medication. In any event, the court was never given any reason to suggest that it should inquire into the defendant's use of such medication.

B. Downward Departure for Substantial Assistance to the Government

Defendant also contends that the district court should have allowed him to withdraw his guilty plea or should have granted him a downward departure under United States Sentencing Guidelines § 5K1.1 for substantial assistance to the government because the government violated its contractual obligation to file a § 5K1.1 motion. This claim is without merit, as the plea agreement specifically provided that Defendant could not withdraw his plea if the government did not move for a downward departure. Additionally, the district court reviewed the government's decision and found that it was not arbitrary or made in bad faith. *See Wade v. United States,* 504 U.S. 181, 186-87 (1992).

C. Sentencing Entrapment

Finally, Defendant argues that the district court did not make the factual findings that we require prior to its refusal to depart downward from the sentencing guidelines for sentencing entrapment. *See United States v. Riewe,* 165 F.3d 727, 729 (9th Sir. 1999). Contrary to Defendant's contention, the district court found that the evidence presented by Defendant did not show that there was sentencing entrapment. Indeed, the court found that the efforts of the government constituted a "lawful investigation." Because the court's findings were not clearly erroneous and it explicitly exercised its discretion not to grant a downward departure, we lack jurisdiction over this issue. *See United States v. Morales,* 898 F.2d 99, 102 (9th Cir. 1990).

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA
Plaintiff-Appellee,

vs.

AGOP BERGHOUDIAN, aka Jack Agop Berghoudian,
Defendant-Appellant.

No. 00-50489
D.C. No. CR-97-01149-RSWL-01

ORDER

FILED
SEPTEMBER 20, 2002
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

Before: FARRIS, SILVERMAN and PAEZ, Circuit Judges.

The panel has voted unanimously to deny the petition for rehearing. Judges Silverman and Paez have voted to deny the petition for rehearing en banc, and Judge Farris so recommends.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing and the petition for rehearing en banc are DENIED.

APPENDIX C

SUMMARY OF WITHHELD INFORMATION

1. *Mutually Inconsistent Stories Regarding Berghoudian*

In December 1995, Robert Jacobson, an admitted methamphetamine addict, with an extremely long rap sheet, found himself in custody once again, held at Wayside Correctional Facility in Los Angeles County.

In December 1995, Jacobson had a conversation with a Los Angeles Sheriff's Deputy, Ojeda, in which he provided information concerning a stash of a "large amount of weapons". According to Jacobson, Ojeda was a "friend" and was asking nothing for this information.

Ojeda apparently contacted a Sheriff's detective from the West Hollywood Division, Hicks, who came to see Jacobson in approximately December 1995. The information which Jacobson gave to Hicks was documented in a report by ATF Agent Ciccone prepared on December 2, 1996. According to Ciccone, Jacobson told Hicks that approximately three months before (September 1995) he had assisted several "unknown" individuals *unload* 50 M-16's and three machine guns *into* a storage locker. Jacobson stated the weapons had probably been stolen from the docks in Long Beach.

This information was related by Hicks to Ciccone, who, based upon the description of the storage locker given by Jacobson, was able to determine that the locker was not in business. Having found that the one piece of information which is subject to corroboration was untrue, Ciccone went back to Jacobson who gave him a second story.

On January 18, 1996, Jacobson stated that within the last month [December 1995 to January 1996] he found out in some unspecified way that Petitioner, Berghoudian, had

moved the weapons from a West Hollywood storage locker to the "graveyard" a junkyard run by Berghoudian.[1]

In an affidavit later prepared by Ciccone in the case, Ciccone stated that the informant told him that the informant and "an individual" in West Hollywood had obtained guns which had come *from* a West Hollywood storage locker and that the informant and this individual [not Berghoudian] moved the guns to the graveyard in Sun Valley.

In a report which Ciccone prepared in October 1997, Ciccone reported that the informant claimed that he had assisted "Lucky" whose last name was unknown, load guns *from Lucky's residence* in West Hollywood into a vehicle. According to Jacobson, he and Lucky then transported them to Dave's Auto in Sun Valley, to Berghoudian. Jacobson related that Lucky said he had stored the weapons in a West Hollywood storage locker.[2]

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[1]In the information released to the Berghoudian before his plea, this story was condensed in a way to remove the inconsistencies. In a Ciccone report of August 19, 1997, Ciccone merely reported that on January 18, 1996 Jacobson told him that he had helped load the stolen guns into a locker in West Hollywood, and that within the last month Berghoudian had moved them to the graveyard. He mentioned nothing about the fact that the locker was not open at the time, and that the second half of the story, Berghoudian's alleged movement of the items out of the locker, was crafted by Jacobson only after he was informed that in fact the locker did not exist. At no time, apparently, did Ciccone ever ask Jacobson how he found out, supposedly, that within the last month Berghoudian had moved these items to the "graveyard". His failure to do so is heightened by the fact that, as will be seen, he later gave completely different stories as to how these weapons supposedly got to the graveyard.

[2]This new version, obviously, was substantially different from the earlier ones, and there appears to have been no inquiry made by Ciccone as to the reasons for these differences. This version is also significant because in it Jacobson purports to be able to identify Lucky's residence

In a report dated February 2, 1996, also disclosed after appellant entered his plea, Ciccone for the first time related the truth about the contact with Detective Hicks, and the change in story by Jacobson after he was told that the storage locker was closed.

On September 19, 1999 the day before a September 20, 1999 hearing in this case, the informant spoke to the Assistant United States Attorney in this matter, and told him that Lucky had swapped guns with the appellant for $1800 and two ounces of methamphetamine. Jacobson claimed that the guns had been *stolen from* a public storage facility on Santa Monica and Highland in West Hollywood, but that he was not involved.

At the September 20, 1999 hearing, Jacobson claimed that Lucky had guns which he had stolen from a storage facility on Santa Monica and Highland in West Hollywood, and that Lucky and Jacobson transported them to Dave's in 1993 to Berghoudian.

As a result, the informant gave the following mutually inconsistent version of the events:

a. *The Guns*

1. The guns were stolen from the docks in Long Beach.

2. The guns were stolen from the storage locker.

3. The guns were kept in a storage locker.

4. The guns were kept at Lucky's house.

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in West Hollywood. When Berghoudian named "Lucky" in a debriefing in pursuit of a downward departure under U.S.S.G. §5K1.1, Ciccone responded that he could not investigate the information because he had no idea who Lucky was, or where he lived.

b. *Movement*

1. The guns were picked up by Lucky without the informant.

2. The guns were picked up with the informant at Lucky's residence.

3. The guns were loaded by the informant and unknown people into a storage locker.

c. *Movement to the Graveyard*

1. They were moved by the informant and Lucky.

2. They were moved by the appellant.

d. *Time Period of Gun Movement*

1. September 1995.

2. December 1995.

3. Late 1993.

4. December 1995 [into the locker].

5. Late 1995-early 1996.

2. *Jacobson, per ATF is violent and unreliable.*

Subsequent to the entry of the plea, the government released a series of reports prepared by Agent Ciccone, which began by stating that they were submitted as a "30 day status report". Each of these reports contains the following startling information:

> "During this reporting period, S.A. Ciccone requested authorization to allow the above-mentioned CRI to be released from state custody temporarily to be utilize [sic] in this investigation. However, this request was denied, due to the fact that the CRI had *a long criminal history of violence and his/her reliability was questionable.*" (Emphasis added).

3. *Monetary Benefits*

Berghoudian entered his plea on July 6, 1998. On August 27, 1998, the prosecution represented that the informant had received no consideration. Defendant's Motion to Withdraw Plea, dated March 23, 1999, pages 7 and 9, [ER 51].

On October 28, 1999, the government reiterated that the informant had received no benefits, indicating it had conducted an investigation into purported benefits.

On January 19, 1999, the government revealed for the first time that the informant had been paid in excess of $4300 in expenses, and $1250 in housing. He had also received an early release from custody.

On March 4, 1999, it was revealed that in fact the informant had received $20,000. There had been numerous requests for his early release. He, and numerous family members had been relocated by the government. He had been offered placement in the federal witness protection program.

APPENDIX D

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UNITED STATES OF AMERICA

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,
Plaintiff,

v.

JACK AGOP BERGHOUDIAN,
Defendant.

No. CR 97-1149-RSWL

ORDER (1) DENYING SECOND MOTION TO WITHDRAW GUILTY PLEA AND ADDITIONAL REQUESTS TO WITHDRAW PLEA AND (2) SETTING SENTENCING DATE

Date: August 14, 2000
Time: 10:00 a.m.
Courtroom: 21

FILED
CLERK, U.S. DISTRICT COURT
JUL 19 2000
CENTRAL DISTRICT OF CALIFORNIA

On or about November 29, 1999, defendant Jack Agop Berghoudian filed his second motion to withdraw guilty plea, along with exhibits in support of that motion, and submitted declarations of William Cone and Michael J. Meyers in support of the motion. The government filed its opposition and supporting exhibits on May 1, 2000.

On or about May 1, 2000, defendant filed his supplemental memorandum in support of his motion to withdraw plea and, on or about May 9, 2000, defendant filed his reply and supporting exhibits (collectively, the "Additional Requests"). On June 26, 2000, the government filed its opposition to the Additional Requests, with supporting exhibits. On or about July 7, 2002, defendant filed his response to the government's opposition. The court conducted hearing on July 10, 2000, at which it heard the arguments of counsel.

The court, having reviewed, read, and considered the foregoing submissions of the parties and having reviewed the record in this matter, denies defendant's second motion to withdraw guilty plea and the Additional Requests, for the following reasons:

1. In his second motion to withdraw guilty plea, defendant seeks to withdraw his plea because (1) the government allegedly breached the plea agreement because defendant allegedly provided information that could have led to the location and identification of an individual known as "Lucky" and (2) defendant could not competently assess the evidence against him. The Court finds that the government did not breach the plea agreement, because the government, prior to interviewing defendant after defen-

dant's change of plea, had information concerning "Lucky," to which defendant did not provide any additional useful information. The Court also finds that defendant was competent at the time that he pleaded guilty and that his plea was knowing and voluntary.

2. In the Additional Requests, defendant claims that the plea colloquy was defective for failure to advise him of his right to the assistance of counsel at trial, failure to advise him that his answers could be later used against him in a prosecution for perjury or false statements, and failure to properly inquire into the voluntariness of the plea. The Court finds that any omissions made in the change of plea colloquy were harmless under Federal Rule of Criminal Procedure 11(h). In doing so, this Court determines that defendant's past criminal history and the acknowledgements that defendant knowingly and voluntarily made in the plea agreement distinguish this case from *United States v. Vonn*, 211 F.3d 1109 (9th Cir. 2000).

3. Defendant also claims in the Additional Requests that, had he known before his guilty plea of inconsistencies in the informant's accounts of defendant's receipt of weapons that preceded the methamphetamine sales in this case, he would have chosen not to plead guilty, but instead to have gone to trial. The Court finds that defendant had sufficient information concerning the credibility of the informant before the entry of the plea to assess whether to plead guilty or to go to trial and that this decision would not have been affected by the material allegedly withheld. Thus, defendant's decision to plead guilty would not reasonably have been affected by the information cited by defendant in the Additional Requests.

For these reasons, the Court DENIES defendant's second motion to withdraw guilty plea and the Additional Requests.

IT IS ALSO ORDERED that sentencing in this matter is scheduled for August 14, 2002, at 10:00 a.m.

DATED: July 19, 2000

/s/ RONALD S.W. LEW
THE HON. RONALD S.W. LEW
United States District Judge

Presented by:

/s/ RONALD L. CHENG
RONALD L. CHENG
Assistant United States Attorney